

Submission to the Education, Tourism and Small Business Committee Inquiry into the Review of the Retail Shop Leases Amendment Bill 2015

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To Whom It May Concern:

Thank you for the opportunity to contribute to the review of the *Retail Shop Leases Act 1994 (Qld)*, as contained in the *Retail Shop Leases Act Amendment Bill 2015 (Qld)*. As a property law practitioner (retired) and academic teaching in the area of real property law, I am particularly interested in the proposed amendments to the Act and the effect they would have in the industry.

1 INTRODUCTION

Queensland was the forerunner in recognising the need for consumer protection legislation in the sphere of retail leasing. Retail leases were often drafted with terms that significantly favoured the Lessor.¹ Legislation was required to provide greater fairness and equity in retail leasing. The enactment of the *Retail Shop Leases Act 1984 (Qld)* (the first RSLA) saw a levelling of the retail leasing playing field, remedying the disproportionate bargaining power that was perceived to exist between shopping centre owners and small-scale retail lessees.

The first RSLA was later replaced with the *Retail Shop Leases Act 1994 (Qld)* (the Act) which commenced on 28 October 1994. The Act is subject to review every seven years² has been subject to various amendments, the most significant of which occurred in 2000 and 2006.

2 OBJECT OF THE ACT

The main purpose of the Act is the 'promotion of efficiency and equity in the conduct of certain retail businesses in Queensland'³ which is to be achieved through 'mandatory minimum standards for retail shop leases' and 'a low cost dispute resolution process' for disputes.⁴

¹ Bill Duncan, *Commercial Leases in Australia* (Lawbook Co, 4th ed, 2011) 79.

² *Retail Shop Leases Act 1994 (Qld)* s 122(2).

3 PROPOSED AMENDMENTS

The Retail Shop Leases Amendment Bill 2015 (Qld) (the Bill) aims to:

- Improve the Act's efficiency and effectiveness;
- Reduce red tape for the Queensland retail sector;
- Continue to safeguard small business tenants, without unduly interfering with commercial arrangements or outcomes; and
- Align with the position in other key eastern seaboard States, where appropriate, to enhance operational efficiency and legal certainty for landlords and tenants operating across jurisdictions.⁵

In order to achieve these aims, the Bill proposes a number of amendments to the Act. This submission addresses a number of these proposed amendments.

3.1. Clause 5 - Restructuring of Definitions

I support the proposed amendment which would relocate the key definitions currently contained in the Schedule to the Act.

In order to ascertain whether the Act applies to a particular transaction, one currently must navigate the Schedule, the Extended Definitions contained in Division 2 of the Act and the Schedule contained in the Schedule to the *Retail Shop Leases Regulation 2006* (Qld) (the Regulations). This process is cumbersome and would be easily remedied through the insertion of new ss 5A – 5C as proposed in Clause 5 of the Bill.

3.2. Clause 5 – Meaning of Retail Shop

I support the proposed amendment contained in Clause 5 of the Bill which would exclude all leases with a floor area greater than 1000m² from the application of the Act.

I do not support amending the definition of *retail shop lease* to exclude certain commercial premises situated in a retail shopping centre as currently proposed in Clause 5 of the Bill.

Whilst it is acknowledged that the object of the Act is to promote efficiency and equity in retail shop leasing, the initial impetus for the introduction of the Act was to remedy the disproportionate bargaining power between large-scale shopping centre owners and small-scale tenants. Bargaining power is a 'complex phenomenon that arises from numerous sources and may assume forms not immediately apparent to an outside observer.'⁶ Disproportionate bargaining power can exist between any large-scale lessor and small-scale lessee; retail or commercial.

If the definition of *retail shop lease* is amended to exclude certain commercial premises situated in a retail shopping centre, the central "consumer protection" focus of the legislation is lost. The Act should, true to its consumer protection focus, seek to protect all small-scale tenants from the

³ *Retail Shop Leases Act 1994* (Qld) s 3.

⁴ *Retail Shop Leases Act 1994* (Qld) s 4.

⁵ Explanatory Notes, Retail Shop Leases Amendment Bill 2015 (Qld), 1.

⁶ Daniel D Barnhizer, 'Inequality of Bargaining Power' (2005) 139(76) *University of Colorado Law Review* 140, 141.

significantly greater bargaining power held by large-scale shopping centre owners; whether retail or commercial. The relevant factor to be considered in this instance is not whether the tenancy is retail or commercial in nature, but rather, the size and bargaining strength of the prospective tenant.

The Australian National Retailers Association (ANRA) supports the protection of small and medium tenants, recognising that '[l]ease regulations are primarily focused on the relationship between small and medium sized businesses and landlords' and are 'designed to address the reported market-failure that arises because of the different bargaining positions of small retailers and landlords.'⁷ It is submitted that this statement is equally applicable to a small or medium sized commercial business and is not strictly confined to the retail sphere.

There is obviously concern that large-scale commercial tenants such as banking institutions, who have sufficient bargaining power and who are comfortable negotiating with the lessor, are able to claim protection under the Act.

To address this concern, the proposed new s 5A(3) of the Act should be amended to provide an additional exemption category for banking institutions. Excluding small-scale commercial tenants, irrespective of where the premises are located in a shopping centre, from the application of the Act is inequitable.

3.3. Clause 15 – Disclosure

I support all of the proposed amendments to the Lessor's disclosure obligations to prospective lessees contained in Clause 15 of the Bill.

In relation to the proposed new s 21A of the Act, I support the amendment to permit a prospective lessee to waive the seven day disclosure period upon receipt of appropriate legal advice. This proposed amendment would provide the flexibility necessary for both parties to be able to proceed with the lease without unnecessary delay.

In relation to the proposed new s 21F of the Act, and more particularly the new s 21F(2)-(3), I support the amendment to clarify the meaning of a *defective statement*. This proposed amendment clearly articulates the threshold for termination for defective disclosure by the lessor. The proposed amendment is likely to reduce disputes over whether a lessee has a right to terminate a lease citing defective disclosure by the lessor.

3.4. Clause 40 – Compensation

I support all of the proposed amendments to the compensation provisions contained in Clause 40 of the Bill.

These proposed new provisions of the Act clarify the circumstances in which a lessee's ability to seek compensation from a lessor will arise. Further, the proposed new s 43AB serves to put the onus on the lessee to take out its own policy of insurance for business interruption.

⁷ Australian National Retailers Association Submission No 20 to Senate Economics Reference Committee, Commonwealth of Australia, *Need for a national approach to retail leasing arrangements* (2015), 28 August 2014, 1.

3.5. Clause 49 – Lessor's Costs

I support all of the proposed amendments to the Lessee's liability for costs associated with preparation of the lease contained in Clause 49 of the Bill.

Specifically, I support the introduction of a new s 48 of the Act to permit the lessor to recover from the proposed lessee the costs of preparation of the final lease in circumstances where the lessee provides written authorisation for the final lease to be prepared and then refuses to sign it. It would be inequitable for the lessor to be restrained from recovering this cost from the lessee in circumstances where the lessee's conduct would usually (had a binding agreement to lease been signed) amount to repudiation of the contract.

3.6. Clause 51 – Release of Assignee from lease

I support the proposed amendment to release the assignor's guarantors from liability on assignment contained in Clause 50 of the Bill.

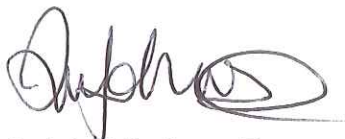
Further, I support the proposed amendment contained in Clause 50 of the Bill to render a refurbishment clause of a lease void unless particulars of the nature, extent and timing of the refurbishment are provided in the lease.

4 CONCLUSION

With the exception of the proposal to amend the definition of *retail shop lease* to exclude commercial premises situated in non-retail areas of shopping centres, I support the amendments proposed in the Bill.

Please do not hesitate to contact me should you wish to discuss my submission further.

Yours faithfully



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